Kepala Batas Bihun Sdn Bhd v Tenaga Nasional Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC) (W)–139–01 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
3 MARCH 2016

Public Utilities — Electricity — Meter-tampering — Discovery of meter-tampering during inspections of premises — Claim for loss of revenue — Allegation that appellant tampered wiring on floor — Whether respondent prove that appellant had tampered with wiring on floor of premises or meter installation — Whether claim for loss of revenue for specified period made with basis — Electricity Supply Act 1990 s 38(3)

The appellant, a company operating a noodle processing business, received supply of electricity from the respondent. An inspection carried out by the respondent's officer ('SP1') revealed that the meter board did not record the correct usage of the electricity. The red phase, in particular, recorded a zero reading instead. This zero reading was seen on the meter board. A second team of officers headed by SP2 was dispatched by the respondent to the premises to conduct a follow up inspection about a week later. SP2 recorded similar reading. SP2 found that the wiring for the arus pendua for red phase was not connected and as a result of the disconnection, the main current on the meter board showed a zero reading. Pursuant to s 38(3) of the Electricity Supply Act 1990 ('the Act'), the respondent made a claim for the loss of revenue in the sum of RM428,327.24. In its defence the appellant denied any meter-tampering. At the end of the trial, the judicial commissioner ('the JC') concluded that there was tampering, upon noting the discrepancy in meter reading involving the red phase. Hence, the present appeal. The appellant contended that the respondent failed to prove that the appellant had tampered with the wiring on the floor of the premises or meter installation and the claim for loss of revenue by the respondent for the specified period was made without basis.

Held, dismissing the appeal with costs of RM20,000:

(1) The finding of facts by the JC was properly supported by good reasons. The trial judge had always had the audio visual advantage to assess evidence and made findings of facts. An appellate court will not intervene with the findings of a trial judge unless the trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and in reaching a conclusion, or had not properly analysed the entirety of the evidence and relevancy of it, or

misapprehended the facts and blindly applied wrong principles of law. There was no error on Her Ladyship's finding of tampering of the meter by the appellant in this case to merit appellate intervention (see para 15).

(2) Not only the appellant failed to rebut that presumption by contending that the appellant had reduced its production, in the end the respondent even agreed that when a comparison is made between the months, the production of the appellant was in fact higher but yet the electricity consumption was much reduced. There was tampering of the meter in this case and the back billing by the respondent was reasonably computed and had not be rebutted by the appellant. Both the grounds of appeal raised were devoid of merit (see paras 24–25).

[Bahasa Malaysia summary

Perayu, syarikat mengendalikan perniagaan pemprosesan mi, menerima bekalan elektrik daripada responden. Pemeriksaan dijalankan oleh pegawai responden ('SP1') mendedahkan bahawa papan meter tidak merekodkan penggunaan betul elektrik. Fasa merah, terutamanya, merekodkan pembacaan kosong sebaliknya. Pembacaan kosong ini dilihat atas papan meter. Lebih kurang seminggu selepas ini pasukan kedua pegawai-pegawai yang diketuai oleh SP2 dikerahkan oleh responden ke premis tersebut untuk menjalan pemeriksaan berikutnya. SP2 merekodkan pembacaan yang sama. SP2 mendapati bahawa pendawaian untuk arus pendua bagi fasa merah tidak dihubungkan dan akibat pemberhentian ini, arus utama di atas papan meter menunjukkan pembacaan kosong. Berikutan s 38(3) Akta Bekalan Elektrik 1990 ('Akta'), responden membuat tuntutan bagi kerugian hasil dalam jumlah RM428,327.24. Dalam pembelaannya perayu menafikan apa-apa pengusikan meter. Pada akhir perbicaraan, pesuruhjaya kehakiman ('PK') memutuskan bahawa terdapat pengusikan, setelah mengenal pasti percanggahan dalam pembacaan meter yang melibatkan fasa merah. Maka, rayuan ini. Perayu berhujah bahawa responden gagal untuk membuktikan bahawa perayu telah mengusik pendawaian di atas lantai premis atau pemasangan meter dan tuntutan untuk kerugian hasil oleh responden bagi tempoh yang dinyatakan tersebut adalah dibuat tanpa asas.

Diputuskan, menolak rayuan dengan kos sebanyak RM20,000:

(1) Dapatan fakta oleh PK adalah dengan betul disokong oleh alasan-alasan kukuh. Hakim bicara sentiasa mempunyai kelebihan visual audio untuk menilai keterangan dan membuat dapatan terhadap fakta. Mahkamah rayuan tidak akan campur tangan dengan dapatan hakim bicara kecuali hakim bicara telah secara jelas gagal untuk mendapatkan manfaat sewajarnya daripada kelebihan yang disangsikan dengan melihat dan mendengar sasksi-saksi di perbicaraan dan dalam mencapai keputusan, atau tidak secara wajar menganalisa keterangan keseluruhannya dan kerelevanannya, atau salah faham terhadap fakta dan membuta tuli

mengguna pakai secara silap prinsip undang-undang. Tidak terdapat kesilapan atas dapatan Yang Arif terhadap pengusikan meter of perayu dalam kes ini untuk mewajarkan campur tangan mahkamah rayuan (lihat perenggan 15).

(2) Bukan sahaja perayu gagal untuk mematahkan bahawa anggapan dengan berhujah bahawa perayu telah mengurangkan pengeluarannya, akhirnya responden juga bersetuju bahawa apabila perbandingan dibuat antara bulan-bulan tersebut, pengeluaran perayu sebenarnya adalah lebih tinggi tetapi penggunaan elektrik adalah kurang. Terdapat pengusikan meter dalam kes ini dan bil kebelakang oleh responden adalah dikira dengan munasabah dan tidak dipatahkan oleh perayu. Kedua-dua alasan rayuan yang dibangkitkan tidak mempunyai merit (lihat perenggan 24–25).]

Notes

For cases on electricity in general, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 2342–2363.

Cases referred to

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165b, PC (refd)
Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)
Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd [2014] 6 MLJ 461, CA (refd)
Sumbang Projeks Sdn Bhd v Tenaga Nasional Bhd [2014] 4 CLJ 323, CA (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (refd)

Legislation referred to

Electricity Supply Act 1990 ss 38, 38(3), (4)

Appeal from: Civil Suit No 22NCVC-365–05 of 2012 (High Court, Pulau Pinang)

Ang Khoon Cheong (CP Ang & Co) for the appellant.
Rusmin Alwani Shukery (Nurmunirah bt Abu Bakar with her) (Rusmin, Ida & Taryna) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court in Penang which allowed the claim by the respondent ('TNB') against the appellant for the sum of RM428,327.24 with costs, for loss of revenue resulting from meter tampering. This claim was based on s 38 of the Electricity Supply Act 1990 ('the ESA'), in particular s 38(3) which reads:

(3) The licensee may require the consumer to pay him for the loss of revenue due to

the offence committed under s 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

[2] The appellant, Kepala Batas Bihun Sdn Bhd is a private limited company operating a noodle processing business at No 1239, Jalan Lahar Kepar, 13200 Kepala Batas, Pulau Pinang. The appellant received supply of electricity from the respondent for the purpose of the appellant's business.

[3] Upon an inspection carried out by the respondent's officer ('SP1') on the *pepasangan meter* ('meter board') at the appellant's premises on 12 May 2011 it was discovered that the meter board did not record the correct usage of the electricity. The red phase in particular recorded a zero reading instead. This zero reading was seen on the meter board.

[4] A second team of officers was dispatched by the respondent to the premises to conduct a follow up inspection about a week later on 17 May 2011. This team was headed by SP2. SP2 similarly recorded a zero reading as shown on the Borang Pemeriksaan Meter LPC Voltan Rendah. The record prepared by SP2 is at p 149 Rekod Rayuan Bhgn C Jilid 1 SP2 found that the wiring for the arus pendua for fasa red phase ('fasa merah') was not connected. As a result of the disconnection SP2 said for this red phase the main current on the meter board showed a zero reading. Accordingly this zero reading could be seen by the naked eye. The presence of both inspection teams on 12 May 2011 and 17 May 2011 respectively, was recorded on the appellant's visitors log.

[5] SP4 testified that a remote meter reading ('RMR') installed in relation to the appellant's premises enabled the respondent to read the appellant's meter from the respondent's office and to issue the monthly electricity bill without the need for a meter reader to be present at the appellant's premises. SP4 testified and explained that if the red, blue and yellow phase were disconnected then there would be zero reading for these phases on the meter board and these zero reading would be shown by the remote meter reading ('RMR'). The zero reading recorded for the red phase by the inspection team on 17 May 2011 at the appellant's premises would also be shown by the RMR.

[6] On the suspicion the team investigated and found tampering. The tampering of the meter was discovered upon the breaking up of the concrete cement conducted in order to inspect the discrepancy in red phase meter reading. The red, blue and the yellow phases were located between the current transformer ('CT') to the TNB's terminal underground. The metal conduit had the markings of being broken or being cut in respect of the red phase. The same broken markings were also found for the yellow and blue phases which however had been restored using black tape. The photographs of the above

description of tampering were produced to evidence the explanation of tampering.

[7] Pursuant to s 38(3) of the ESA the respondent made a claim for the loss of revenue. In claiming for back-billing charges SP3 testified that the calculation as at 12 May 2011 was based on the daily average use of electricity calculated for a period of four months prior to a sudden drop of the usage. SP3 referred to the *Pengiraan Bil Kebelakang and Graf Perbandingan Penggunaan Elektrik (rekod rayuan Bhd C Jilid 1)*. According to SP3 there was a sudden drop of usage of electricity by the appellant on 14 October 2008. Therefore the back-billing charges was calculated from 14 October 2008 until 12 May 2011 ('date of inspection'). SP3's testimony can be found at pp 109–110 of *rekod rayuan tambahan*. The respondent claimed for the sum of RM428,327.24 as the unrecorded usage of electricity for the period from 14 October 2008 till 12 May 2011.

[8] In its defence the appellant denied that any tampering of the meter installation at its premises had taken place.

[9] Having assessed the evidence before her the learned judicial commissioner ('the JC') had found the respondent's case proven on the balance of probabilities and allowed the claim as prayed.

[10] In the appeal before us the appellant had raised two main grounds. The appellant contended firstly that the respondent had failed to prove that the appellant had tampered with the wiring on the floor of the premises or meter installation. Secondly the appellant contended that the claim for loss of revenue by the respondent for the period between 14 October 2008 to 12 May 2011 was made without basis.

OUR DECISION

[11] We have perused through the grounds of judgment of the learned JC very carefully. In concluding that there was tampering, the learned JC had in her grounds of judgment explained in great detail how the tampering was discovered by the representatives of the respondent through their investigation, upon noting the discrepancy in meter reading involving the red phase. There were photographs tendered in court P6(1) to (36) to show the tampering. The learned JC had accepted the explanation by both SP2 and SP4 on the same. Both the witnesses had explained in meticulous detail as to how they conducted the test on the tampering. The evidence was carefully analysed and were clearly considered at paras 21–38 of Her Ladyship's ground of judgment.

[12] The learned JC had also considered the evidence of the appellant in defence given through SD1. In Her Ladyship's finding the evidence of SD1 was mere hearsay because SD1 had only joined the appellant company after the inspection and investigation of the tampering. SD1 joined the company only in November 2011. The contention of SD1 that he was a consultant to the appellant even before he started work there and thereby was aware of the alleged tampering incident, was not substantiated by any evidence. The learned JC had therefore given very little probative value to his testimony. It is for this reason also that the learned JC found the evidence of SD1 and of the defence remained mere hearsay.

[13] The learned JC had further considered the issue raised by the appellant that if there was such a tampering it could have been discovered much earlier through the meter reading RMR. On this, the learned JC accepted the explanation by SP5 that RMR was only used to read meter on the usage of electricity in order to issue the monthly billing and not for the purpose of detecting discrepancy such as this. It was also the evidence of SP5 which was accepted by the learned JC that if there was any discrepancy in a meter reading the RMR would not be able to detect them. The learned JC in accepting the evidence and explanation by SP5 had taken into account the complaint raised by the defendant on the evidence of SP4 relating to RMR, which was at variance with that of SP5. The learned JC instead accepted the evidence of SP5 on RMR because Her Ladyship had found that SP4 was in fact a technician from Jabatan Hasil SEAL. SP4 was not from unit RMR and therefore would not be in the best position to explain on RMR whereas, SP5 was the Pengurus Cawangan and had clearly explained that RMR could not detect tampering. According to SP5 tampering could only be detected through investigation conducted.

[14] Upon her further analysis of the evidence of all the representatives of the respondent SP1, SP2, SP3 and SP4 and SP5 together with the evidence of SD1 above the learned JC had positively concluded that tampering was clearly proven. SP4 according to the learned JC had shown and demonstrated positively in specific terms how the tampering to all the three phases had brought the confiscated meter in exh P13 to demonstrate his explanation. Having perused through the analysis of the evidence made by the learned JC in her grounds of judgment we are in agreement with her facts findings and analysis of evidence in coming to her conclusion.

[15] Suffice for us to say that the finding of facts by the learned JC was properly supported by good reasons for which we are in no position to disturb. The trial judge had always had the audio visual advantage to assess evidence and made findings of facts. It is well established principle that generally an appellate court will not intervene with the findings of a trial judge unless the

trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and in reaching a conclusion, or has not properly analysed the entirety of the evidence and relevancy of it, or misapprehended the facts and blindly applied wrong principles of law (see *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (SC), *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165b (PC)). We do not find any such error on Her Ladyship finding of tampering of the meter by the appellant in this case to merit our appellate intervention.

[16] The next ground of appeal raised by the appellant was on the quantum claimed by the respondent. The appellant contended that the respondent was not entitled to claim losses or back-billing from 14 October 2008 to 12 May 2011 because there was no evidence to show that there was meter tampering prior to 12 May 2011. Before we deliberate further on this issue we took note that the claim made by the respondent was premised on the provision of s 38(4) of the ESA. The section reads:

> A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying –
>
> (a) The amount of loss of revenue or the expenses incurred by the licensee; and
>
> (b) The person liable for payment thereof, shall be prima facie evidence of the payment that has to be made by the consumer under subsection (3).

[17] The learned JC relied on the *Penyata Amaun Terkurang Caj* (exhs P6 and P7) issued by SP3 as prima facie proof of loss of revenue suffered by the respondent pursuant to s 38(4) above. The appellant's main complaint was that the loss of revenue complained of predated the date SP1 first discovered some evidence of tampering on 12 May 2010. It was therefore contented that the back-billing from 14 October 2008 was made without basis as there was no proof that the tampering in fact took place until it was first discovered by SP1 on 12 May 2010.

[18] It was explained by the witnesses of the respondent on how the back-billing was computed. SP3 had explained that the average usage was computed based on a stable period of usage before the sudden surge detected in October 2008. Thereafter, there was no further increase in the usage for the red phase. The learned JC accepted the computation by SP3 who had explained how he had arrived at his computation based on the graphs of usage in exhs P8 and P9. SP3 explained that he had computed the average use four months prior to the sudden drop date of 14 August 2008. In our view the learned JC had correctly accepted the evidence of SP3 and the explanation of back-billing as a prima facie proof under s 38(4) of the ESA. Calculated on that average the

amount came up to RM428,372.24 for the period from 14 October 2008 to 12 May 2011. A

[19] Learned counsel submitted that the learned JC had misdirected herself in accepting SP3's evidence on the basis that the appellant did not challenge his evidence. Our perusal of the grounds of judgment shows that the learned JC at para 42 of her grounds of judgment states 'Defendan kedua gagal mencabar keterangan SP3 mengenai cara pengiraan'. Reading the judgment as a whole it is quite obvious what the learned JC meant was that the appellant ('Defenden Kedua') had failed in its attempt to impugn the evidence of SP3. The learned JC did not mean that there was no challenge made on SP3's evidence by the appellant. In its proper context it became clear that the learned JC had discussed the attempts by the appellant to challenge on the evidence of SP3 was made, but what she meant was that the appellant had failed in its attempt, because it did not adduce credible evidence to dispute a prima facie case and the evidence of SP3 in establishing the prima facie case for the respondent. Thus there was no misdirection by the learned JC but her finding was in fact taken out of context by learned counsel. The grounds of judgment of the learned JC revealed that she had considered the challenge made on SP3's billing but she had rejected the evidence adduced through SD1 for lack in probative value. B C D E

[20] The learned JC has clearly addressed the evidence before her and had posed the correct question of the whether the appellant had rebutted that presumption relied by the respondent under s 38(4) and had done so by adducing sufficient evidence. The learned JC found that in an attempt to rebut that presumption the respondent had through SD1 sought to challenge the back-billing. The appellant attempted to introduce evidence to suggest that the drop in the usage was due to lower production but no credible evidence was put forth to support such stand. There was no evidence to support the appellant's case that, the drop in the usage was attributed by its lower production in those period. F G

[21] SD1 had attempted to first suggest that the production of the appellant's company for November and December 2008 was lower in order to support a contention of a low usage. SD1 was referring to an identification document marked IDD-28 and IDD-29 to support his contention though as we have earlier alluded to SD1 had not commenced work with the appellant until November 2011. In cross-examination however counsel for the appellant had informed the court that IDD-29 and IDD-28 would not be tendered as evidence before the court. With that it left the appellant with no evidence to rebut any presumption under s 38(4) relied by the respondent. H I

[22] We were referred to the various decisions by this court on the issue of back-billing claimable by the respondent in cases of tampering. Learned

counsel cited to us the decision of this court in *Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd* [2014] 6 MLJ 461 to contend that the prima facie proof under s 38(4) of the ESA is subjected to challenge. We have no issue with the principle of law established in the case cited. Similar legal position was echoed in *Sumbang Projeks Sdn Bhd v Tenaga Nasional Bhd* [2014] 4 CLJ 323. In both these cases the Court of Appeal had held that; there must be clear explanation on how a back-billing is computed; it cannot be based on speculation, or done in an arbitrary manner. In the present case we agree with the learned trial judge that the computation had been properly and reasonably explained and it was accepted by the learned JC. The two cases cited had also established that to rebut that presumption the appellant would have to adduce acceptable evidence to contradict the prima facie evidence relied upon by the respondent. We would also say that this is a long established legal principle. The learned JC held that given the circumstances of the case the computation was reasonable and had not been contradicted by any acceptable evidence by the appellant. It is apparent that each case would have to be decided on its own facts. These are issues which are facts sensitive and hence the cited cases would not assist the appellant, when the appellant failed to adduce evidence to rebut presumption.

[23] For completeness, we noted that another ground of appeal raised by the appellant was also on issue of whether or not there was a need to have a conviction, before there could be a claim for loss of revenue under s 38. Even though it was not pursued in the oral submission of learned counsel for the appellant, we noted that the requirement for a conviction is unnecessary for the respondent to make a claim under s 38(4). The legal position had been made clear by the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 which held that there is no legal requirement for there to be prosecution and conviction first, before a claim for loss of revenue is sustained.

[24] In conclusion we agree with the learned JC that not only that the appellant failed to rebut that presumption by contending that the appellant had reduced its production, in the end the respondent through SD1 even agreed that when a comparison is made between the month of October 2008 with November and December 2008, January to June of 2009, January to March and May 2011 the production of the appellant was in fact higher but yet the electricity consumption was much reduced.

[25] To sum up, on the evidence in the appeal records we agree with the finding by the learned JC that there was tampering of the meter in this case. And the back billing by the respondent was reasonably computed and had not be rebutted by the appellant. Both the grounds of appeal raised were devoid of merit. We therefore dismissed the appeal by the appellant with costs of RM20,000 to the respondent.

Appeal dismissed with costs of RM20,000.

Reported by Afiq Mohamad